Filed 5/31/07 In re Evelia C. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re EVELIA C., a Person Coming Under the Juvenile Court Law.	B193201 (Los Angeles County Super. Ct. No. CK 58403)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. LUCILLE C., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Albert J. Garcia, Commissioner. Reversed.

Maureen L. Keaney for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

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Lucille L. (mother) appeals from the termination of parental rights under Welfare and Institutions Code section 366.26[1] with respect to her daughter, Evelia C. Mother asserts she was denied her due process right to notice of the section 366.26 hearing and the juvenile court erred in proceeding with the hearing after learning she was incarcerated and there was no waiver of her attendance. Respondent Los Angeles County Department of Children and Family Services (Department) argues defects in the notice of appeal require dismissal because mother failed to sign the notice of appeal and the record does not reflect her attorney had authority to sign on her behalf, because mother did not purport to appeal from a prior ruling that notice was properly served, and because mother failed to raise the claimed error in the court below. We agree with mother that the order terminating parental rights denied her due process and therefore reverse.

FACTS

The child, born March 2005, was removed from mother shortly after birth due to mother and child both testing positive for cocaine.[2] Mother appeared at the initial detention hearing on March 14, 2005, and the court appointed counsel to represent her. The juvenile court ordered the child detained, and the Department placed the child in the home of a paternal aunt of the child's siblings. For the jurisdictional and dispositional hearing, the social worker reported to the juvenile court that mother had admitted to a history of drug use and admitted using cocaine while pregnant. The social worker recommended reunification services but reported the caretaker was interested in adoption should reunification efforts fail.

The Department gave mother notice that a combined jurisdictional and dispositional hearing would take place on May 13, 2005, by mailing a notice to mother at the maternal grandmother's home on Cedar Avenue in Long Beach. Mother appeared at the hearing and pleaded no contest to the section 300 petition. The court assumed

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1 All further statutory references are to this code unless otherwise indicated.

2 The father's separate appeal was previously dismissed by this court.

jurisdiction over the child and declared her a dependent under section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). The court ordered reunification services for mother, including thrice weekly, three-hour monitored visits with the child.[3] The court directed mother to keep the Department advised of her address and telephone number at all times and to return for a six-month review hearing on November 7, 2005.

For the six-month review hearing scheduled to take place on November 7, 2005, the social worker reported that mother had visited the child about seven times during the prior six-month period.[4] The social worker stated that mother had not been complying with her case plan, and her present whereabouts were unknown. Numerous attempts were made to contact mother, to no avail. The social worker stated she had a "good mailing address" for mother, the maternal grandmother's home on Cedar Avenue in Long Beach. Both the maternal grandmother and the caretaker told the social worker that mother was a transient. The maternal grandmother said she was unaware of mother's address. The caregiver wished to adopt the child, and the Department had initiated an adoptions assessment.

In addition to the notice that mother had received in court on May 13, the social worker mailed a notice of the November 7 review hearing to mother at the maternal grandmother's Cedar Avenue address, as well as two other addresses in Long Beach. Mother failed to appear at the November 7 hearing, but her attorney and the maternal grandmother were present. The court subsequently continued the six-month review hearing twice due to reasons including improper notice, setting the hearing ultimately for January 31, 2006.

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[3] Mother was also ordered to participate in a drug rehabilitation program with random testing, parent education and individual counseling to address physical abuse issues.

[4] According to the caregiver, mother was unkempt when she visited the child, stayed only about 10 to 15 minutes to ask about the child and had little interaction with her.

In November 2005, the Department conducted a due diligence search for mother that included a search of the records of the California Youth Authority, California Department of Motor Vehicles, probation/parole, registrar of voters/county clerk, county jail,[5] welfare department, military, parent locator and postal service, as well as two internet search sites. The search indicated the Cedar Avenue address was mother's last known mailing address and yielded six other possible addresses for mother in Long Beach. In a January 2006 supplemental report, the social worker reported that the maternal grandmother had stated mother was transient and she was not sure where mother lived and that the caregiver had reported mother said she lived "behind some crates in Wilmington."

For the continued hearing on January 31, 2006, the Department again mailed notice to mother at the Cedar Avenue address. The Department recommended that mother's reunification services be terminated and asked the court for permission to serve mother by serving her attorney if mother did not provide an address for personal service.

Mother failed to appear for the hearing on January 31, 2006, but her attorney was present. The court terminated reunification services for mother and set the matter for a section 366.26 hearing on May 30, 2006, to select a permanent, out-of-home plan for the child. The court found that notice of the proceedings had been given to "all appropriate parties as required by law." At the end of the hearing, the court orally directed that notice of the next hearing be mailed "to all addresses to the mother, *plus* to the mother care of her attorney, return receipt, certified mail, unless they can personally serve the mother." (Italics added.) However, the court's minute order recited that notice was to be given to "mother at all addresses *or* serve mother's attorney." (Italics added.)

The Department gave mother's attorney notice by mail of a review hearing to take place on March 10, 2006. Notice was also given to mother by mail at the Cedar Avenue address. On March 10, finding notice of the proceedings had been given the parents "as

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[5] The county jail search disclosed mother had been arrested on September 29, 2005, and released on September 30, 2005.

required by law," the court ordered the Department to complete and approve a home study by April 19.

On April 19, 2006, the social worker reported to the juvenile court that mother's whereabouts remained unknown, and the Department had been unsuccessful in contacting mother despite notices sent to the Cedar Avenue address. Both the maternal grandmother and the child's caretaker said they were unaware of mother's whereabouts.

For the section 366.26 hearing set for May 30, 2006, the social worker reported mother had not visited the child recently and her whereabouts were still unknown. The Department again recommended termination of parental rights and adoption as the child's permanent placement goal. The Department resubmitted the declaration of due diligence for the search completed in November 2005. Mother was given notice of the May 30, 2006 hearing only by certified mail in care of her attorney.

Mother's attorney attended the May 30 hearing, but mother was not present. The court specifically found notice of the proceedings had been given to all appropriate parties as required by law. However, the court continued the section 366.26 hearing to July 17, 2006, because there was no waiver of appearance by the incarcerated father. The court directed that notice of the continued hearing be given to all "appropriate" parties and to the mother "at all addresses found *and* in care of her attorney by certified mail, return receipt requested." (Italics added.)

For the hearing on July 17, 2006, however, the Department again served mother notice only by certified mail in care of her attorney. Despite the court's directive, no separate notice was sent to mother at the addresses reflected in the due diligence report.

Mother's attorney and the maternal grandmother appeared at the July 17 hearing, but not mother. After receiving into evidence the declaration of due diligence reflecting the Department's attempts to locate mother in November 2005, about eight months previously, the juvenile court found notice of the proceedings had been given to all appropriate parties as required by law. It then orally ordered parental rights terminated.

At that point in the section 366.26 hearing, the Department's counsel said, "Your Honor, the grandmother has a question." The court inquired, "What is it?" The maternal

grandmother stated, "My daughter is in jail, but I am going to help her to go to rehab, and she's going to try to get the four girls." The court interjected, "Wait a minute. Where is she?" The maternal grandmother responded, "She's in jail." The court asked, "Where is she?" The maternal grandmother answered, "In Lynwood." The court inquired, "When did she get arrested?" The response was, "I am not sure, but I just found out that she has been over there. I have been going to visit her." The court further asked, "When did she get arrested?" The maternal grandmother responded, "I have been seeing her for a month and a half. I am not sure." The child's attorney protested, "The court found notice proper to her on May 31st [*sic*]." The court observed, "She has an attorney present. It won't change anything on the case." The Department's counsel then added, "It also said to renotice mother in care of her attorney by certified mail."[6] The maternal grandmother voiced an objection for mother, saying, "She [mother] wants to try to see if she can get the four girls. I am going to help her and do everything I can do for her because she probably gets out today. [¶] But I came over here because I went to see her yesterday. She wanted to know what is going to happen with the baby. She wants to reunite with the four girls." Rather than object to lack of notice for mother, her counsel appeared to join forces with the Department and the child's counsel, interjecting, "For the record, I would like to just state that we did have her with a last known address and I have had no contact with her." The court thereupon stated, "Then what we show is due diligence completed notice to you which was proper. Okay. [¶] Thank you."

The court subsequently ordered adoption to be the permanent plan for the child.

Mother's counsel timely filed a notice of appeal on mother's behalf from the July 17, 2006 order terminating parental rights.

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[6] Counsel's comment was accurate as far as it went, but it omitted the juvenile court's further order that notice also be given mother "at all addresses found."

DISCUSSION

1. Dismissal of Appeal

The Department contends the appeal should be dismissed because mother failed to preserve her rights to appellate review. The Department asserts: (1) mother failed to sign the notice of appeal and there is no indication her attorney had authority to file the notice of appeal on mother's behalf; (2) because the notice of appeal fails to refer to the original section 366.26 hearing held on May 30, 2006, mother cannot be heard to complain of the alleged errors occurring on that date; and (3) mother forfeited appellate review by failing to bring her contentions of error to the attention of the juvenile court. We disagree.

Under California Rules of Court, rule 8.100(a)(1), a notice of appeal must be signed by "[t]he appellant or the appellant's attorney." (See *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853 [rule satisfied when any person authorized by the appellant signs on his or her behalf].) A notice of appeal signed by an unauthorized attorney is ineffectual in preserving appellate rights because an attorney cannot appeal without the client's consent. (*In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043.)

In many respects, this case is like *Alma B.* As with the parent in *Alma B.*, mother was not present at the hearing on July 17, 2006, when the court made the findings and orders from which she purports to appeal. (*Alma B.*, *supra*, 21 Cal.App.4th at p. 1043.) As in *Alma B.*, the Department also has not known of mother's whereabouts for some time, apparently since shortly after the jurisdictional and dispositional hearing, nor did mother's counsel know of her location at the time of the section 366.26 hearing. Similar to *Alma B.*, it can be inferred appellate counsel may not have known of mother's location since no declaration of authorization to file the appeal appears in the record or was proffered to this court despite the Department's request to dismiss the appeal.[7] But,

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[7] The reply brief merely posits that "[p]erhaps, to be expeditious, counsel signed the notice of appeal" or "[p]erhaps [mother] was not immediately available." The reply brief also notes "[t]here were a plethora of reasons why [mother] did not personally sign the notice of appeal, none of which indicate whatsoever she did not consent or authorize her attorney to sign the notice."

unlike *Alma B.*, the notice of appeal in the present case was not accompanied by a declaration attesting to counsel's belief, based on client contacts, that his client " 'would desire a review of this case.' " (*Ibid.*) We agree with the Department there is no affirmative evidence in the record showing mother's consent to the appeal. On the other hand, there is an utter lack of showing an appeal was *not* authorized by mother.

This case is unlike *In re Sean S.*, where the mother was properly noticed for the section 366.26 hearing and could have attended, but instead telephoned her attorney and told him, quite simply, she "was just not going to show up." (*In re Sean S.* (1996) 46 Cal.App.4th 350, 352.) The court held in *Sean S.* that a parent who voluntarily has chosen not to appear at the section 366.26 hearing has "functionally abandoned" any parental interest in the child. (*Sean S.*, *supra*, at p. 352.) In such a case, no trial attorney could infer consent or authorization to file a notice of appeal on the parent's behalf. (*Id.* at p. 353.) Here, however, there was no showing mother received actual notice of the section 366.26 hearing, nor did mother express a lack of concern in the fate of her child. In fact, through the maternal grandmother, mother indicated an inability to attend the hearing because she was incarcerated and expressed an interest in reunifying with her child.

California Rules of Court, rule 8.100(a)(2) declares the notice of appeal must be liberally construed in favor of its sufficiency. There is also a strong public policy in favor of hearing appeals on their merits. (*Seeley v. Seymour*, *supra*, 190 Cal.App.3d at pp. 853-854.) Absent a satisfactory showing mother did not authorize her counsel to sign the notice of appeal, therefore, we will presume counsel had the necessary authority from mother to file an appeal on her behalf. (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 910; see also *In re Asia L.* (2003) 107 Cal.App.4th 498, 505.)

We further reject the Department's argument that mother's failure to appeal from the court's order of May 30, 2006, precludes her from appealing on the basis of lack of notice of the section 366.26 hearing. As mother properly notes, the court's May 30 order is material to her appeal only insofar as the court ordered notice of the section 366.26 hearing to be served upon mother "at all addresses found *and* in care of her attorney by

certified mail, return receipt requested." (Italics added.) Mother does not contend the court erred in making such an order but rather that the Department failed to give her notice as ordered since it gave notice only in care of her attorney and failed to serve notice at "all addresses found" for mother.

We are also not persuaded by the Department's argument that mother forfeited her right to appeal for failure to raise the notice issue below. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293.) As the Department concedes, application of the forfeiture rule is not automatic. (*Ibid.*) A party's failure to object in the lower court does not deprive an appellate court of authority to review an order, particularly when an important issue is involved. (*Ibid.*) A social services agency's failure to give notice "carries . . . grave consequences [to a parent] in a dependency court, where parent-child ties may be severed forever." (*In re DeJohn B.* (2000) 84 Cal.App.4th 100, 102.) When such an agency fails to make a reasonable attempt to give a parent notice of a proceeding at which the parent-child relationship may be terminated, and the parent's attorney has failed to object to the lack of notice in the juvenile court, we may exercise discretion to entertain the parent's appeal from the resulting termination of parental rights. (*In re Anna M.* (1997) 54 Cal.App.4th 463, 469 [lack of notice of § 366.26 hearing, coupled with procedural defects and lack of advocacy, justifies review].) We accordingly address the merits of mother's appeal.

2. Denial of Due Process Right to Notice of Section 366.26 Hearing

"Parents have a fundamental and compelling interest in the companionship, care, custody, and management of their children." (*In re DeJohn B.*, *supra*, 84 Cal.App.4th at p. 106, citing *Stanley v. Illinois* (1972) 405 U.S. 645, 651.) Thus, until parental rights have been terminated, the parents must be given notice at each step of the proceedings. (*In re DeJohn B.*, *supra*, at p. 106.) Such notice must comport with due process, which requires notice reasonably calculated under all the circumstances to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections. (*Ibid.*)

The United States Supreme Court has observed: "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, [citations], or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 315; see also *In re Emily R.* (2000) 80 Cal.App.4th 1344, 1352.)

Section 294, subdivision (a), in pertinent part directs the Department to give notice of a section 366.26 hearing to the parents, the grandparents if the parents' whereabouts are unknown, and all counsel of record. The methods of effectuating proper notice of the section 366.26 hearing are described in section 294, subdivision (f). These include personal service upon the parent, which clearly did not apply here. Service also may be accomplished on a parent by certified mail, return receipt requested, to the parent's last known mailing address together with a return receipt signed by the parent or by substituted service at the parent's usual place of residence or business. (§ 294, subd. (f)(2) & (4).) Alternatively, if a parent's identity is known but his or her whereabouts are unknown and the parent cannot, with reasonable diligence, be served with notice of the section 366.26 hearing, the Department "shall file an affidavit with the court at least 75 days before the hearing date, . . . describing the efforts made to locate and serve the parent." (§ 294, subd. (f)(7).) If the court determines there has been due diligence in attempting to locate and serve the parent and the recommendation for a permanent plan for the child is adoption, service "shall be to that parent's attorney of record, . . . by certified mail, return receipt requested." (§ 294, subd. (f)(7)(A).) In that case, the court shall also order that notice be mailed to the grandparents if their identities and address are known. (*Ibid*.) This procedure was not followed.

The Department contends it made good faith efforts to notify mother of the section 366.26 hearing by submitting its due diligence search for mother and notifying her

attorney by certified mail. It also asserts search efforts continued and were documented in its report submitted for the April 19, 2006 hearing, six weeks prior to the initial section 366.26 hearing on May 30. The record establishes these efforts were not reasonably calculated to give mother actual notice under the circumstances of the case.

At the commencement of the proceedings mother provided the Department with a permanent address: the maternal grandmother's home on Cedar Avenue. (§ 316.1, subd, (a).) The Department sent mother notice by mail to that address for the jurisdictional and dispositional hearing, and mother had appeared for that hearing. Even if subsequent notices to that address had produced no appearance for mother, the Department's own due diligence investigation in November 2005 disclosed the address remained a good mailing address for her. An inquiry to the postmaster, giving mother's name and asking whether or not the Cedar Avenue address "is one at which mail, for this individual is currently being delivered," produced the response that "mail is delivered to address given [the Cedar Avenue address]." There was no indication notices mailed to mother at the maternal grandmother's address were returned as "undeliverable," and mother never indicated to the Department her permanent address should be changed to any other address. The Department did not even attempt to notify mother of the section 366.26 hearing by certified mail, return receipt requested, at the Cedar Avenue address or to serve mother at the other addresses disclosed during its due diligence search, as the juvenile court had ordered.

Even if the Department believed the Cedar Avenue address was no longer a good address for mother, section 294, subdivision (a)(5) requires notice of a section 366.26 hearing to be served on the child's grandparents, if their address is known and the parent's whereabouts are unknown. The Department admittedly never sent any notice of the section 366.26 hearing to the maternal grandmother. Service on the maternal grandmother very likely could have resulted in mother's learning of the section 366.26 hearing since the maternal grandmother was in touch with mother, knew her whereabouts and had been visiting her at the county jail for the previous one and a half months. Although the maternal grandmother appeared at the section 366.26 hearing, there was no

indication she was aware of the proposed termination of parental rights or permanent plan of adoption.

Under these circumstances, notice by certified mail to mother's counsel was a mere gesture not reasonably calculated to give mother actual notice of the section 366.26 hearing. This effectively deprived mother of an opportunity to challenge the Department's proposed permanent plan for her child and denied her right to a fair hearing.

Moreover, because mother was incarcerated, had no notice of the section 366.26 hearing and was not free to leave the jail, she did not voluntarily absent herself from the section 366.26 hearing. (See Pen. Code, § 2625, subds. (b) & (c) [incarcerated parent has right to notice and to be present at a § 366.26 proceeding]; see *In re Julian L.* (1998) 67 Cal.App.4th 204, 208 [incarcerated parent's waiver of appearance at scheduled section 366.26 hearing not a waiver of right to notice of continued hearing].) Once the juvenile court learned of mother's incarceration, the court erred in not ordering a brief continuance to arrange for mother's presence or waiver of attendance and in proceeding to terminate parental rights at the hearing. Even though the focus at the section 366.26 hearing is on the child's right to stability and permanency (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309), a short continuance to allow mother to be heard would not have adversely affected the child's stability. (*In re Julian L.*, *supra*, at p. 208.) When a prisoner is involuntarily absent from a dependency proceeding, the resulting order is reviewed for harmless error. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 625.) In mother's case, we do not find the error was harmless given the juvenile court's oversight of its own orders directing notice for mother and the grave consequences to her, coupled with the relative ease with which appropriate notice could have been given. (*In re Julian L.*, *supra*, at p. 208.)

We disagree with the Department's contention that once the juvenile court had orally indicated parental rights were terminated it had no power to "vacate" the termination order. (See § 366.26, subd. (i).) Oral orders made in court are subject to the court's plenary power until formally entered. (*People v. Surety Ins. Co.* (1983) 148

Cal.App.3d 351, 357.) "[T]he judge is free to make new and different orders so long as it is done before the court clerk or a minute clerk prepares the permanent minutes." (*Ibid.*) There is no indication the clerk had already prepared the permanent minutes, and the maternal grandmother notified the court mother was in custody only moments after the court announced its ruling. The juvenile court therefore retained authority to continue the section 366.26 hearing.

DISPOSITION

The judgment is reversed. The matter is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J.

RUBIN, J.